United States Court of Appeals

for the Second Circuit

PETITIONER'S BRIEF

No. 74-1286

United States Court of Appeals

FOR THE SECOND CIRCUIT

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

v.

THE NEWTON-NEW HAVEN COMPANY,

Respondent.

On Application for Enforcement of an Order of
The National Labor Relations Board

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

ISSUE PRESENTED

Whether the Board abused its discretion in overruling the Company's objection to the election and certifying the Union[1] as the bargaining representative for an appropriate unit of Company employees, and thereafter properly found that the Company violated Section 8(a)(5) and (1) of the Act when it refused to bargain with the Union.

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[1] United Rubber, Cork, Linoleum & Plastic Workers of America, AFL-CIO, CLC.

STATEMENT OF THE CASE

This case is before the Court upon the application of the National Labor Relations Board pursuant to Section 10(e) of the National Labor Relations Act ("the Act") as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. Sec. 151 et seq.) for enforcement of its order issued on December 12, 1973 against The Newton-New Haven Company (hereinafter "the Company"). The Board's Decision and Order (A. 3-13)[2] are reported at 207 NLRB No. 116. This Court has jurisdiction of the proceedings, the unfair labor practice having occurred at North Haven, Connecticut, where the Company manufactures metal die castings and related products.

I. THE BOARD'S FINDINGS OF FACT

A. The Representation Proceeding

On April 13, 1973, pursuant to a Direction of Election by the Regional Director for the Board's First Region based upon a representation petition filed by the Union, an election was held in an appropriate unit of the Company's production and maintenance employees (A. 8; 28).[3] Of the approximately 183 eligible voters in the unit, 169 cast ballots, 87 for the Union and 82 against (A. 5, 28).[4]

On April 19, 1973, the Company timely filed five objections regarding conduct affecting the election (A. 26-27), all of which were overruled by the Regional Director (A. 28-35). Thereafter, the Company filed a

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[2] "A." references are to the appendix herein. References preceding a semicolon are to the Board's findings; those following are to supporting evidence.

[3] The Company admitted the appropriateness of the unit (A. 47, 54).

[4] Two ballots were challenged but were not sufficient to affect the results of the election (A. 5, 28).

timely exception with the Board seeking review only with respect to the ruling on its fourth objection (A. 39-43). This alleged that "a Union representative, acting as an official observer during the election, engaged in prohibited conversations with employees during the election hours and while in the course of his duties as an official observer and engaged in improper electioneering conduct" (A. 26, 29). To support this objection, the Company presented three witnesses who stated as follows:

During the afternoon voting period, when Union observer Juan Vega and a Company observer went to the Casting department to notify the department foreman to release employees to vote, Vega left the Company observer and walked around the department for one to three minutes (A. 32). The same afternoon, Vega spoke in Spanish to employees in the Die Casting and Power Press departments.[5] He also told two employees to vote and talked to other employees, two of whom were ineligible to vote, but what was said was not overheard by the Company witness (A. 33). A foreman who observed Vega's conduct warned him to stop conversing with employees, but Vega continued to walk around the foreman's department (*ibid.*) During the voting period that evening, Vega left the voting area in the cafeteria and went down the hallway where he talked with an employee who had already voted. The Board agent ordered Vega back into the cafeteria (*ibid.*).[6]

As indicated above, the Regional Director, after an investigation pursuant to the Board's Rules and Regulations (Section 102.69, 29 C.F.R.

[5] The Company observer did not understand Spanish (A. 33).

[6] Vega stated that he did not leave the Company observer during the afternoon polling period and spoke to only one employee, asking him in English whether he had voted. With regard to the hallway incident, Vega stated that two employees asked him where they could get coffee since the cafeteria, which was being used for voting, was inaccessible, and he referred them to the Board agent conducting the election (A. 33).

102.69), issued a Supplemental Decision on May 18, 1973, overruling the objections and certifying the Union (A. 5; 28-36). In overruling objection four, the only one in issue here, the Regional Director assumed the truth of the statements of the Company's witnesses (A. 33). The Company filed a timely request with the Board for review of the Director's decision seeking, on the basis of its objection four, to set aside the election or to have an evidentiary hearing on that objection (A. 39-43). The Board on June 11, 1973, denied the request on the ground that it raised no substantial issues warranting review (A. 6; 44).

B. The Unfair Labor Practice Proceeding

Notwithstanding the Board certification, the Company refused to bargain with the Union (A. 4; 47-48). On July 19, 1973, the Union filed unfair labor practice charges with the Board and on August 10, 1973, the Board issued a complaint, alleging that the Company had violated Section 8(a)(5) and (1) of the Act (A. 4; 45-49). The Company filed an answer on August 22 admitting that it had refused to bargain with the Union (A. 54, 48) but contesting the validity of the election (A. 54).

On August 30, the General Counsel filed a motion for summary judgment (A. 4; 55-60). On September 12, the Board transferred the proceeding to itself and issued a notice to show cause why the motion for summary judgment should not be granted. In response, the Company filed an answer which, in effect, simply reiterated its objection to the election (A. 61-65).

ARGUMENT

THE COMPANY DID NOT SUSTAIN ITS BURDEN OF ESTABLISHING THAT THE BOARD ABUSED ITS DISCRETION IN CERTIFYING THE UNION AND THE BOARD THEREFORE PROPERLY FOUND THAT THE COMPANY VIOLATED SECTION 8(a)(5) AND (1) OF THE ACT

The Company concededly refused to bargain with the Union, which had been certified by the Board as the exclusive bargaining representative of Company employees in an appropriate unit. Accordingly, if the Board's certification is valid, the Company's admitted refusal to bargain violated Section 8(a)(5) and (1) of the Act. *Polymers, Inc. v. N.L.R.B.*, 414 F.2d 999, 1001 (C.A. 2, 1969), cert. denied, 396 U.S. 1010. See also *Magnesium Casting Co. v. N.L.R.B.*, 401 U.S. 137, 139, 141-142 (1971).

It is well established that "Congress has entrusted the Board with a wide degree of discretion in establishing the procedure and safeguards necessary to insure the fair and free choice of bargaining representatives by employees." *N.L.R.B. v. A.J. Tower Co.*, 329 U.S. 324, 330 (1946). See also *N.L.R.B. v. Gissel Packing Co.*, 395 U.S. 575, 612 n. 32 (1969). As this Court recently stated, "[t]he conduct of representation elections is the very archtype of a purely administrative function, with no *quasi* about it, concerning which courts should not interfere save for the most glaring discrimination or abuse." *N.L.R.B. v. Olson Bodies, Inc.*, 420 F.2d 1187, 1189 (C.A. 2, 1970), cert. denied, 401 U.S. 954.

It is equally well established that "[t]he burden of setting aside an election is a heavy one and falls upon the party attacking it." *Polymers, Inc., supra,* 414 F.2d at 1004. Accord, *e.g.; Intertype Co. v. N.L.R.B.*, 401 F.2d 41, 44 (C.A. 4, 1968), cert. denied, 393 U.S. 1049; *N.L.R.B. v. Mattison Machine Works,* 365 U.S. 123, 124 (1961) (*per*

curiam). And to be entitled to a hearing on an objection, "the objecting party must offer the Board specific evidence which *prima facie* would warrant setting aside the decision of the Regional Director . . . * * * and make a preliminary showing that a hearing will not be a waste of time." *Bausch & Lomb, Inc. v. N.L.R.B.*, 404 F.2d 1222, 1226 (C.A. 2, 1968); *U.S. Rubber Co. v. N.L.R.B.*, 373 F.2d 602, 606 (C.A. 5, 1967). Finally, it is the Board's well-established and judicially approved practice not to consider in an unfair labor practice proceeding matters which were, or could have been, raised in the underlying representation proceeding. *Pittsburgh Plate Glass Co. v. N.L.R.B.*, 313 U.S. 146, 161-162 (1941); *Magnesium Casting Co. v. N.L.R.B., supra*, 401 U.S. at 141; *N.L.R.B. v. Horn & Hardart Co.*, 439 F.2d 674, 683 (C.A. 2, 1971).

We show below that the Company here did not carry its burden of establishing either that it was entitled to a hearing or that the Board abused its discretion as to the conduct of elections in overruling the Company's objection and finding in effect that the conduct of the union observer was not sufficient to impair "the exercise of a free choice by the employees" (*Intertype Co. v. N.L.R.B., supra*, 401 F.2d at 45).

While in representation elections, the Board seeks to establish "laboratory" or "ideal conditions as far as possible," it nevertheless must "appraise the actual facts in the light of realistic standards of human conduct." *Liberal Market, Inc.*, 108 NLRB 1481, 1482 (1954), quoted with approval in *Schneider Mills, Inc. v. N.L.R.B.*, 390 F.2d 375, 379 (C.A. 4, 1968). Consequently, a Board election "should not be judged against theoretically ideal, but nevertheless artificial standards * * * . . . [and] the results of a secret ballot, conducted under Government sponsorship and with all the safeguards which have been developed throughout the years, should not be lightly set aside." *Ibid.*

However, the Board has in recent years established a strict rule with regard to possible electioneering of employees in the polling area or waiting in line to cast ballots. *Milchem, Inc.*, 170 NLRB 362, 363 (1968). The *Milchem* rule is that, upon proper objection, an election normally will be set aside because of "*prolonged conversations* between representatives of any party to the election and *voters waiting to cast ballots* . . . without inquiry into the nature of the conversations." *Ibid.*[7] (Emphasis added.) The Board has noted, however, "this does not mean that any chance, isolated, innocuous comment or inquiry by an employer or union official to a voter will necessarily void the election." *Ibid.* In the polling areas, the *Milchem* rule also applies to election observers. *Hard Chrome Service Co., supra; General Dynamics Corp.*, 181 NLRB 874, 875 (1970). Outside these areas, the Board has indicated that conversations by an observer with employees being escorted to the polling area would provide a basis for voiding an election if such conversations are of sufficient "magnitude" and "clearly beyond those which might normally be engaged in by an observer in fulfilling his observer function." *General Dynamics Corp.*, 181 NLRB 874, 875 (1970).

Here, however, the only actual conversation of the Union observer with prospective voters reported by Company witnesses was no more than his urging an employee to vote, without any claim that he suggested how he should vote (A. 33-34). And, as the Board found (A. 33), the short time that he was away from the Company observer – estimated

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[7] The rule was also applied by the Board to set aside elections in *Star Expansion Industries Corp.*, 170 NLRB 364, 365 (1968); *Modern Hard Chrome Service Co.*, 187 NLRB 82, 83 (1970).

However, the *Milchem* rule does not apply to electioneering during an election which is at a sufficient distance from the polling area or from voters waiting to vote. *Harold W. Moore & Son*, 173 NLRB 1258 (1968); *Marvil International Security Service*, 173 NLRB 1260 (1968).

The rule has received apparent judicial approval. *Sonoco Products Co. v. N.L.R.B.*, 443 F.2d 1334, 1337 (C.A. 9, 1971) (remanded on other grounds); *N.L.R.B. v. Union Carbide Caribe, Inc.*, 423 F.2d 231, 233 (C.A. 1, 1970); *N.L.R.B. v. Corry Foam Products Co.*, 489 F.2d 807, 809 (C.A. 6, 1973).

by Company witnesses to be from one to three minutes – "would preclude him from having any substantial conversations with anyone." Thus, the Company's evidence failed to establish conduct contravening the *Milchem* rule, even if that rule were deemed applicable beyond the vicinity of the polling area. However, this conduct occurred neither within the polling area nor in its immediate vicinity (A. 34). The observer's evening conversations also took place outside the polling area, and so far as appears, they were not with any employees other than ones who had already voted (A. 34). Plainly, the Company presented no evidence to support the claim in its objection that Vega "engaged in improper electioneering" (A. 26). Consequently, its objection boils down to a contention that the election should be set aside because Vega did not adhere strictly to the instruction of the Board agent, in that he spoke briefly to employees instead of talking only to Company foremen. Since, as the Board observed in *Milchem*, 170 NLRB at 363 (see also *Schneider Mills, supra, loc. cit.*), evaluation of the validity of a Board election must be "informed by a sense of realism," it was well within the Board's discretion in these circumstances to conclude that these were minor infractions which did not so impinge upon the election as to destroy "the fair and free choice of bargaining representatives by the employees." (*A.J. Tower Co., supra, loc. cit.*) Thus, it is plain that the Company did not sustain its burden of furnishing "specific evidence of specific events" which would warrant voiding the election, *U.S. Rubber Co. v. N.L.R.B., supra, loc. cit.*, or even warrant the holding of a hearing since the Board in considering its objection assumed the truth of the Company evidence.

Accordingly, the Board did not abuse its discretion in certifying the Union as the employees' bargaining representative and it properly found that the Company violated Section 8(a)(5) and (1) of the Act by refusing to bargain with the Union.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Board's order should be enforced in full.

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	)	
Respondent.	)	

CERTIFICATE OF SERVICE

The undersigned certifies that three (3) copies of the Board's offset printed brief in the above-captioned case have this day been served by first class mail upon the following counsel at the address listed below:

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NATIONAL LABOR RELATIONS BOARD

Dated at Washington, D. C.
this 17th day of May, 1974.